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In The

Supreme Court of the United States

October Term, 1986

ALBERT K. BROWN; CATHERINE D. BROWN; KENT ROSENBERG; ARLENE ROSENBERG; VICTOR SCHULER; ELIZABETH SCHULER; DONALD E. WOOD; ELLEN L. WOOD; AMERICAN NATIONAL BANK, a State Banking Corporation, Trustee under the Earl Hilliard Trust; MARGARET HILLIARD; JEROME A. RAY, KAREN M. RAY and KENNETH E. HILLIARD,

Petitioners,

vs.

SHELL OIL COMPANY, a Delaware corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTIONS PRESENTED

Petitioners' Statement of "Question Presented for Review" is neither short nor concise. It is argumentative and violates the provisions of U.S. Sup. Ct. Rule 21.

Petitioners apparently contend that this case raises the question of whether their 14th Amendment due process rights have been violated by the Michigan Court of Appeals' determination that they are subject to the state severance tax on oil and gas and the Michigan Supreme Court's refusal to grant leave to appeal that determination.

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COUNTER STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners' statement of "Constitutional and Statutory Provisions Involved" consisted of constitutional provisions that have never been involved in this case. The only pertinent statutory provisions are contained in the Michigan Severance Tax Act.

M.C.L.A. 205.301; M.S.A. § 7.351:

SEC. 1. There is hereby levied upon each producer engaged in the business of severing from the soil, oil, or gas, a specific tax to be known as the severance tax.

M.C.L.A. § 205.312(2); M.S.A. § 7.362(2):

(2) 'Producer' as used in this Act means a person who owns, or is entitled to delivery of a share in kind or a share of the monetary proceeds from the sale of, gas or oil as of the time of its production or severance.

M.C.L.A. § 205.315; M.S.A. § 7.365:

SEC. 15. The severance tax herein provided for shall be in lieu of all other taxes, state or local, upon the oil or gas, the property rights attached thereto or inherent therein, or the values created thereby; upon all leases or the rights to develop and operate any lands of this state for oil or gas, the values created thereby and the property rights attached to or inherent therein: Provided, however, Nothing herein contained shall in anywise exempt the machinery, appliances, pipelines, tanks and other equipment used in the development or operation of said leases, or used to transmit or transport the said oil or gas: And provided, further, That nothing herein contained shall in anywise relieve any corporation or association from the payment of any franchise or privilege taxes required by the provisions of the state corporation laws.

COUNTER STATEMENT OF THE CASE

Petitioners were Plaintiffs in an action against Respondent Shell Oil Company in which they claimed damages for allegedly improper deductions from their royalty payments. One of the allegedly improper deductions was the royalty owners' share of the state severance tax which is calculated as a percentage of the gross cash market value of oil and gas at the time it is severed from the soil. Petitioners claimed that the deduction of a pro-rata share of the severance tax from their royalty was improper because their leases with Shell Oil Company did not provide for such a deduction.

The severance tax in Michigan is imposed on "producers":

> There is hereby levied upon each producer engaged in the business of severing from the soil, oil or gas, a specific tax to be known as the severance tax. M.C.L.A. 205.301; M.S.A. § 7.351.

The Act defines "producer" as follows:

> 'Producer' as used in this Act means a person who owns, or is entitled to delivery of a share in kind or a share of the monetary proceeds from the sale of, gas or oil as of the time of its producetion or severance. M.C.L.A. § 205.312(2); M.S.A. § 7.362(2).

As owners of royalty interests, Petitioners are entitled to delivery of a share in kind or a share of the monetary proceeds from the sale of, gas or oil as of the time of its production or severance. Thus, contrary to Petitioners' assertion, Shell was not charging Petitioners a portion of Shell's severance tax burden. Rather, Respondent Shell was merely acting as a conduit, deducting Petitioners' sev-

erance tax obligation from the royalty and paying that sum to the state.

Respondent moved the trial court for partial summary judgment of the severance tax claim. The trial court agreed with Respondent's position that Petitioners were subject to the tax, and ruled that their share of the tax was properly deducted from royalty payments notwithstanding the alleged absence of a specific lease provision. Respondent's motion for partial summary judgment was granted.

Petitioners appealed this ruling to the Michigan Court of Appeals, arguing that royalty interests did not fall within the statutory definition of "producer" and, alternatively, that their assertions in the Complaint raised a factual issue that precluded partial summary judgment. Petitioners maintained, "The question is simply one of statutory interpretation". Petitioners' Brief to the Michigan Court of Appeals, (Petitioners' Appendix at C-7) Petitioners argued in the Court of Appeals, and apparently still maintain, that a 1963 opinion of the Michigan Attorney General requires an interpretation that the severance tax is not imposed on royalty interests. However, the Court of Appeals recognized that shortly after this nonbinding Attorney General opinion, the Michigan Legislature amended the Act to apply to the "producer" and adopted the definition of "producer" that so clearly includes royalty interest owners. In addition, the Severance Tax Act formerly provided that the payment of the tax "shall be required of the severor or producer actually engaged in the operation of severing the oil or gas," whereas the amendments provide that the payment of the severance tax "shall be required of each producer." M.C.L. § 205.303; M.S.A. § 7.353. The Court of Appeals reasoned:

> We find that the 1965 amendment to the Severance Tax Act was, in part, a reaction to OAG 1963-1964, No. 4160, *supra*.

Brown v. Shell Oil Company, 128 Mich. App. 111, 116 (1983) (Petitioners' Appendix A-7).

Adopting the trial court's position, the Court of Appeals affirmed the partial summary judgment.

Petitioners requested rehearing in the Court of Appeals, repeating their identical arguments. Petitioners later supplemented their appeal with the unsubstantiated suggestion that one of the Court of Appeals judges may have been in conflict because an individual thought to be related to him was listed in an oil industry telephone book. The reqeust for rehearing was denied.

Petitioners' application for leave to appeal to the Michigan Supreme Court was held in abeyance during the pendency of another tax related case, and eventually was denied. The Michigan Supreme Court also rejected Petitioner's motion to reconsider the denial of leave to appeal.

ARGUMENT FOR DENYING WRIT OF CERTIORARI

I. This Case Involves Purely State Questions That Should Not Be Entertained In This Court.

U.S. Sup. Ct. Rule 17 provides that certiorari is a matter of jurisdictional discretion and will be granted "only when there are special and important reasons therefor." Respondent contends that this case is woefully

lacking in special or important reasons for the discretionary exercise of jurisdiction.

As noted by the Michigan Court of Appeals Opinion and as evidenced by Petitioners' selection of pleadings in their Appendix, this case has never involved constitutional issues. At each stage through the Michigan courts, the only issue has been one of interpreting a state taxing statute. Petitioners never raised a constitutional challenge to the Act itself and such a constitutional challenge, if any, should be directed against the State of Michigan in another action.

Since the Michigan courts simply analyzed the specific terms of the Severance Tax Act to determine whether Petitioners were subject to the Act, and because Petitioners never raised a constitutional challenge in the lower courts, this Court should decline to exercise its discretionary jurisdiction.

> . . . [T]he question whether or not the . . . interest under the circumstances was correctly subjected to the tax was a purely state question, not involving any violation of the constitution of the United States, and which therefore we have no right to review. *Moffit v. Kelly*, 218 U.S. 400, 405 (1910); *Nickel v. Cole*, 256 U.S. 222 (1921).

The remainder of this brief addresses the specific arguments raised in Petitioners' Petition.

II. Petitioners Are Not Entitled To A Writ Of Certiorari.

In Section A of their Petition, Petitioners argue that the Michigan courts' "wrongful" interpretation of state law violated their due process rights because that inter-

pretation constitutes "an obvious subterfuge to evade consideration of a constitutional issue . . . particularly where the father of the presiding judge of the deciding tribunal could have a financial interest in the outcome." Petitioners' argument is absolutely unfounded and false.

The Michigan courts did not avoid constitutional issues, they simply had no constitutional issues to address. In *Ward v. Love County*, 253 U.S. 17 (1919), relied on by Petitioners, this Court noted that the state court's adoption of a sham argument to avoid federal issues may constitute a deprivation of due process. However, where fairly and substantially supported, a state court ruling that is not based on federal grounds cannot be challenged in the Federal Supreme Court. *Ward v. Love County, supra.*

There was no obvious subterfuge in this case and no constitutional issue to avoid. The lower courts fairly and substantially supported their rulings, giving plain meaning to the statutory language. The courts simply noted that the tax is imposed on the "producer" and that the Act sets out a clear definition of "producer" that unquestionably included Petitioners. The absence of reference in the Petition for Writ of Certiorari to the statutory definition that formed the basis of the Michigan courts' rulings, demonstrates that the only ones guilty of issue avoidance are Petitioners.

Petitioners' attack on the ethics of Court of Appeals Judge Holbrook is inaccurate and offensive. With no more than an uncertain telephone listing in an industry directory, Petitioners have assumed that Judge Holbrook concealed a financial interest in the outcome of the case.

Petitioners conducted no investigation and created no record to support this outrageous suggestion. Respondent, on the other hand, took the simple step of calling the number in the directory after Petitioners raised the issue. As represented to, and obviously accepted by, the Court of Appeals and Michigan Supreme Court, Judge Holbrook's father, now deceased, once pooled some resources with business acquaintances several years earlier and drilled two unsuccessful wells in 1981. Had Petitioners conducted even a cursory investigation before making such a scandulous accusation, they would have recognized its total lack of merit. In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 823 (1986), cited by Petitioners, this Court ruled that a judge should disqualify himself where he has a "direct, personal, substantial and pecuniary" interest that would lead the average judge not to hold the "balance" true. That is simply not the case here. Judge Holbrook had absolutely no interest at all that would have affected his independent judgment.

III. Petitioners Failed To Raise Federal Constitutional Issues In The Lower Courts.

In Argument B, Petitioners argue on the one hand that the Court of Appeals side-stepped their constitutional arguments, and on the other hand that they did not raise constitutional issues until they were "surprised" by the Court of Appeals affirmation of the trial court. Neither argument is accurate or meritorious.

The Michigan courts side-stepped nothing. The "constitutional" argument asserted in Petitioners' Argument B was never asserted in the courts below. Although Petitioners cited the same cases to the Michigan Court of

Appeals that Petitioners now use to support a "constitutional" argument, they were previously used only as persuasive support for Petitioner's statutory construction argument. Petitioners maintained in the Court of Appeals that "[t]he question is simply one of statutory interpretation" Petitioners' Brief on Appeal (Petitioner's Appendix C-7), and the Court of Appeals noted that Petitioners "did not raise any constitutional challenges in this case". *Brown v. Shell Oil Company, supra,* at 117 (Petitioners' Appendix A-8).

Interestingly, the Petition for Writ of Certiorari never cites the definitional provision in the Severance Tax Act that formed the primary basis of the lower court rulings. As noted in Respondent's Counter Statement of Case, legislative amendments to the Act provided a specific definition of those entities that would be subject to the tax and the Michigan courts merely applied that statutory definition to Petitioners. This is not a situation such as the Court faced in *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673 (1930), where the state court barred the Plaintiffs from seeking a remedy. Moreover, even the *Brinkerhoff* Court recognized:

> It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court. 281 U.S. at 680.

Petitioners had every opportunity to raise constitutional arguments but chose not to do so. Respondent con-

tends that it would have been the wrong party against which to direct a constitutional challenge of the tax in any event.

IV. Petitioners Had No Right To Be "Surprised" By The Court Of Appeals Affirmation Of The Trial Court's Decision.

Petitioners' claim of surprise at the Court of Appeals' characterization of the severance tax is irrelevant and lacks merit. As argued above, Petitioners had, and still have, every opportunity to challenge the constitutionality of the severance tax in an appropriately styled case against the State of Michigan. This action for damages against Shell merely involved Petitioners' assertion that Respondent breached its lease contract by deducting Petitioners' share of the severance tax from the royalty payments, and passing those sums on to the state. Respondent does not "impose" the tax, that is the exclusive province of the State of Michigan.

In rationalizing their rulings, the state courts merely applied the statutory definition that Petitioners have so completely ignored. The characterization of the tax as being in lieu of other property taxes on the severed oil and gas has questionable relevance to the real issues of this case.

Moreover, Petitioners can hardly raise a legitimate claim that the Michigan Court of Appeals surprised them by its characterization of the tax. In this regard, the Court of Appeals merely repeated the Michigan Legislature's characterization of the tax it enacted:

> The severance tax herein provided for shall be in lieu of all other taxes, state or local, upon the oil or gas,

the property rights attached thereto or inherent therein, or the values created thereby; upon all leases or the rights to develop and operate any lands of this state for oil or gas, the values created thereby and the property rights attached to or inherent therein . . . M.C.L.A. § 205.315; M.S.A. § 7.365.

V. The Michigan Court Of Appeals' Decision Did Not Constitute "Forced Construction", But Was Based On Sound Statutory Interpretation.

Petitioners argue that the Michigan Courts employed "forced construction" to avoid federal constitutional issues. As previously argued and supported, the lower courts avoided nothing. Petitioners never raised a constitutional issue to be avoided.

While Petitioners argue that the Michigan courts used "forced construction", they have eliminated from their Petition any reference to the statutory definition of "producer" that was at the very heart of each lower court's ruling. The Michigan courts simply gave the language of that definition its ordinary meaning and applied that meaning to Petitioners. The real issue in this case was simple: Do Petitioners fall within the clear statutory definition? Petitioners had ample opportunity to argue their position in the trial court hearing, the Court of Appeals hearing, on motion for rehearing in the Court of Appeals, on request for leave to appeal to the Michigan Supreme Court, and on rehearing of the Michigan Supreme Court's denial of leave to appeal.

Where there can be no pretense that the state court adopted its view to evade constitutional issues, and the case is decided on non-federal grounds, the Supreme

Court must accept the decision whether right or wrong. *Wolfe v. North Carolina,* 364 U.S. 177 (1960); *Nickel v. Cole,* 256 U.S. 222 (1921). There can be no pretense of evasion in this case, the Michigan courts decided the case on non-federal grounds and this court must accept the Michigan courts' decisions.

VI. This Court Is Bound By The Michigan Courts' Determination Where No Federal Right Is Involved.

Petitioners cite *Carpenter v. Shaw,* 280 U.S. 363 (1920) to support their position that this court is not bound by a state court determination of the "nature" of a tax. *Carpenter,* however, presented a very different situation to this Court because the issue in that case was whether the severance tax could be imposed on federally protected Indian property interests. Here, there is no federal property right involved. This Court should not exercise its discretionary jurisdiction over a state court interpretation of state law affecting non-federal property. *Wolfe v. North Carolina,* 364 U.S. 177 (1960); *Nickel v. Cole,* 256 U.S. 222 (1921).

Petitioners' reliance on *Carpenter* is significant in one respect, this Court's interpretation of the Oklahoma Severance Tax. After ruling that this Court was not bound by a state court determination when federel rights were involved, this Court concluded that the severance tax on royalties in Oklahoma was in lieu of all other taxes "upon any property rights attached to or inherent in the right" to the specified minerals and "upon the mining rights and privileges for the minerals aforesaid belonging to or apertaining to the land." 280 U.S.

at 368. This is precisely the interpretation of the Michigan severance tax that was reached by the Michigan Court of Appeals on the basis of the clear language of the Act. 128 Mich. App. at 118-119 (Petitioners' Appendix A-9, A-10).

VII. This Case Is Not An Appropriate Vehicle For Petitioners To Seek Redress From The Alleged Deprivation Of Constitutional Rights.

Contrary to Petitioners' assertion, the denial of their application for Writ of Certiorari will not preclude them from challenging the constitutionality of the severance tax in a later action against the state. The Michigan courts have ruled only that Respondent is not liable in damages for deducting Petitioners' severance tax obligation from royalty payments and turning those sums over to the state. While principles of res judicata will operate to preclude another damage claim against Respondent by Petitioners, it will not preclude Petitioners from instituting a new action against the State of Michigan and obtaining full relief in the event the severance tax is found to be unconstitutional.

Petitioners correctly anticipated that Respondent would contend that it is not the appropriate party against which to direct a constitutional attack on the severance tax. Respondent, in fact, shares Petitioners' status as a "producer" and payor of the severance tax. Respondent does not "impose" the tax and is no more a guarantor of the constitutionality of the tax than is the mortgagee bank that "pays" property taxes imposed on mortgagor land owners. If Petitioners truly believe that the tax is un-

constitutional, they should seek complete relief in another action.

———o———

CONCLUSION AND RELIEF REQUESTED

Petitioners have utterly failed to demonstrate the "special and important reasons" for exercising this Court's discretionary jurisdiction. This case has never involved federal constitutional issues, it is a simple case of state court interpretation of state law. The decisions of the Michigan courts are rationally supported by clear statutory provisions. Disappointed in the outcome below, Petitioners have ignored the true reasoning of the Michigan courts and have manufactured new arguments in an attempt to get "one more bite of the apple". That is not this Court's function and the Petition for Writ of Certiorari should be denied.

WHEREFORE, Respondent Shell Oil Company respectfully requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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